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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CLEM LEMAR DAVIS,

Defendant and Appellant.

E061036

(Super.Ct.No. INF026511)

OPINION

APPEAL from the Superior Court of Riverside County. Charles Everett Stafford, Jr., Judge. Affirmed in part; reversed in part and remanded for resentencing.

Cindi B. Mishkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL BACKGROUND

On December 9, 1997, an amended information charged defendant and appellant Clem Lamar Davis with possession of cocaine base for sale (Health & Saf. Code, § 11351.5; count 1); felon in possession of a firearm (Pen. Code,¹ § 12021, subd. (a); count 2); and receiving stolen property (Pen. Code, § 496; count 3). The amended information also alleged that defendant was personally armed with a firearm in the commission of the possession for sale offense (Pen. Code, § 12022, subd (c)). The amended information further alleged that defendant had two prior strike convictions (Pen. Code, §§ 667, subs. (c) & (e)(2), 1170.12, subd. (c)), and two serious felony convictions (Pen. Code, § 667, subd. (a)).

On December 17, 1997, a jury convicted defendant on all counts and found true the gun arming enhancement. The jury also found true the prior strike allegations. The trial court sentenced defendant to a total indeterminate term of 75 years to life in prison for the three counts. Sentence on the section 667, subdivision (a), enhancement was not imposed because there was no current serious or violent felony conviction. Additionally, the court did not impose a sentence on the section 12022, subdivision (c), enhancement. Finally, the court ordered 341 days actual presentence credits and 60 days of conduct presentence credits under section 2933.5.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

The Three Strikes Reform Act of 2012 (Reform Act) became effective on November 7, 2012. Among other things, it added section 1170.126, which provides a resentencing option to “persons presently serving an indeterminate term of imprisonment” under the Three Strikes law. (Reform Act, § 6.) On December 7, 2012, defendant filed a petition for recall of sentence. After a hearing, the trial court denied defendant’s petition, finding that he was statutorily ineligible under section 1170.126, subdivision (e)(2), which disqualifies any defendant who was armed during the commission of the commitment offense. On April 22, 2014, defendant filed a timely notice of appeal.

B. FACTUAL BACKGROUND²

“In the fall of 1996, defendant was on parole from the California Department of Corrections. He was classified as a ‘high risk parolee.’ In October 1996, Officer Demers, who knew defendant from previous contacts, provided defendant's parole agent, Jane Williams, with information that defendant was dealing drugs. Agent Williams thought the information justified a parole search. After Agent Williams located defendant, she conducted a parole search. No contraband was found. Defendant was charged with being in a place where drugs were sold and released. He was then placed on sporadic surveillance.

² The facts of defendant’s commitment offense are taken from the opinion from his prior appeal, case No. E022114.

“On February 13, 1997, Officer Demers contacted Agent Williams and told her that he had supervised a controlled buy involving defendant two days earlier. He also said another controlled buy was scheduled. He testified he wanted Agent Williams to authorize a parole search ‘to assure that [defendant] would have rock cocaine on his person at the time.’ Agent Williams testified the function of a parole agent is to ensure parolees reintegrate into the community and are rehabilitated by monitoring how they are doing in their personal life, drug use, employment and possible contacts with people. Based on the information provided by Officer Demers, she directed him to search defendant.

“When defendant left his home in Palm Springs on February 13, 1997, he was stopped by uniformed officers who were accompanied by a parole agent. The officers searched and found a police scanner in defendant’s car and a pager on defendant’s person.

“The officers and parole agent accompanied him to his residence where he was ‘strip searched.’ The officers found a plastic baggie containing five pieces of rock cocaine totaling 4.2 grams in defendant’s underwear. They also found 13 \$20 bills. In his residence, they found a stolen loaded Smith and Wesson .9-millimeter handgun, a stolen cellular telephone, and dominion and control papers bearing defendant’s name and address.” (*People v. Davis* (June 3, 1999, E022114) [nonpub. opn.])

At the trial in the 1997 case, Detective Jose Garcia testified that he questioned defendant about whether defendant carried the seized firearm with him. Defendant told the detective that defendant took his chances carrying a handgun while on parole. Defendant said that he bought the handgun several weeks before the incident, and explained that he carried the gun and dealt drugs while on parole because he was “all about . . . making money.”

DISCUSSION

A. DEFENDANT IS INELIGIBLE FOR RESENTENCING OF POSSESSION OF COCAINE BASE FOR SALE (COUNT 1) UNDER SECTION 1170.126

Defendant contends that he is eligible for resentencing on possession of cocaine base for sale (count 1) because he is not currently serving a sentence for being armed with a firearm as required under section 1170.126, subdivision (e)(2).

Section 1170.126, subdivision (e) establishes the conditions an inmate must satisfy to be eligible for resentencing. One of them is set forth in subdivision (e)(2), which requires that an inmate’s commitment offense not be imposed for any of the enumerated offenses listed in sections 667, subdivision (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(i)-(iii). Both of these sections include, in pertinent part, the following disqualifying offense: “During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

The firearm arming enhancement alleged against defendant provided that a person who is personally armed with a firearm in the commission of a violation or attempted violation of Health and Safety Code section 11351.5, among other offenses, shall be punished by a consecutive term of three to five years. (Pen. Code, § 12022, subd. (c).)

Here, the jury found that defendant was armed with a firearm in the commission of the offense of possessing cocaine base for sale. Under the terms of sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii), defendant was “armed with a firearm or deadly weapon” during the commission of his current offense. Defendant received an indeterminate term of 25 years to life for his possession for sale conviction. Defendant, therefore, is ineligible for resentencing under section 1170.126, subdivision (e)(2), since his current sentence was imposed for a crime in which he was contemporaneously armed with a firearm.

Nonetheless, defendant claims that he is eligible for resentencing because his sentence was not imposed *for* the firearm arming enhancement. Defendant contends that the sentence must be imposed for the disqualifying factor. In support of his position, defendant cites to *People v. Atkins* (2014) 229 Cal.App.4th 536. *Atkins*, however, was granted review by the California Supreme Court on November 12, 2014, S221786. As defendant states in his reply brief, “[b]ecause the Supreme Court has granted review in *Atkins*, any reliance on that case is now inapposite.”

Contrary to defendant’s contention, all that needs to be shown is that defendant was armed with a firearm during the commission of his commitment offense. (See *People v. Quinones* (2014) 228 Cal.App.4th 1040, 1045 (*Quinones*).) In *Quinones*, the

defendant was convicted of possession of heroin for sale, transportation of a controlled substance, and possession of a firearm by a convicted felon. (*Id.* at p. 1042.) The jury also found that defendant was personally armed during the drug offenses. (*Ibid.*) At sentencing, the trial court struck the arming allegation “as being unnecessary” because it imposed a sentence on the felon-in-possession charge in addition to the drug offenses. (*Ibid.*) On appeal, the defendant claimed he was eligible for resentencing because the court’s act of striking the arming enhancement prevented a later finding that he was armed during the commission of his commitment offense. (*Id.* at pp. 1042-1043.) The *Quinones* court disagreed, explaining that the striking of the enhancement did not change the fact that the defendant was armed with a firearm during the commitment offense. (*Id.* at p. 1044.) Nothing from the record suggested any “legal infirmity with the enhancement, such as a lack of evidentiary support, or other legal defect.” (*Ibid.*) Accordingly, even though the enhancement was stricken, it did not change the fact that the defendant was ineligible for resentencing under section 1170.126. (*Quinones*, at p. 1044.)

In this case, unlike *Quinones*, the trial court did not strike the firearm enhancement. It merely declined to impose a sentence because defendant had already received punishment for being in possession of the firearm. (§ 12021, subd. (a).) Nonetheless, as the court in *Quinones* explained, even if the trial court had struck the arming enhancement, it did not negate the jury’s factual finding that defendant was armed during the commission of his offense for possession for sale of cocaine base. (*Quinones*, *supra*, 228 Cal.App.4th at p. 1044.)

Nonetheless, defendant argues that the language of section 1170.126, subdivision (e)(2), makes him eligible for resentencing. According to defendant, he cannot be disqualified under the provision because he was not sentenced for being armed with a gun. Instead, his sentence was imposed for being a felon in possession of a gun.

As pertinent here, section 1170.126 states: “(e) An inmate is eligible for resentencing if: [¶] . . . [¶] (2) The inmate’s current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.” As described above, this incorporates the language regarding armed “[d]uring the commission of the current offense” found in sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii). Ineligibility is not limited to when a defendant is sentenced for being armed or any of the other factors described in sections 667, subdivision (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(iii). Rather, if the trial court finds that defendant was armed, used a deadly weapon, or inflicted great bodily injury during the commission of the offense for which he seeks resentencing, then defendant is ineligible for resentencing. Since the trial court made this finding in rejecting defendant’s petition, we accordingly reject his contention.

B. DEFENDANT IS SEPARATELY ELIGIBLE FOR RESENTENCING ON HIS CONVICTIONS FOR RECEIPT OF STOLEN PROPERTY (COUNT 3) AND FELON IN POSSESSION OF A FIREARM (COUNT 2)

Defendant contends that he is eligible for resentencing under section 1170.126 on his convictions for receiving stolen property and being a felon in possession of a firearm, because the jury did not find that he was armed during the commission of those offenses. Based on the conclusion recently reached by the California Supreme Court in *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), we agree with defendant and remand the matter.

After the parties filed their briefs on this appeal, the California Supreme Court in *Johnson, supra*, 61 Cal.4th 674, resolved this exact issue. The *Johnson* court concluded: “In sum, section 1170.126 is ambiguous as to whether a current offense that is serious or violent disqualifies an inmate from resentencing with respect to another count that is neither serious nor violent. Considering section 1170.126 in the context of the history of sentencing under the Three Strikes law and Proposition 36’s amendments to the sentencing provisions, and construing it in accordance with the legislative history, we conclude that resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent. Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the

inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an inmate who has served a sentence that fits the crime and who is no longer dangerous." (*Id.* at pp. 694-695.)

A decision of the California Supreme Court is controlling authority and must be followed by lower courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we remand the matter to the trial court for a hearing on defendant's petition to recall his sentence and for resentencing.

C. THE TRIAL COURT IMPOSED AN UNAUTHORIZED SENTENCE

Defendant contends that the trial court imposed an unauthorized sentence in 1998 because it failed to pronounce a sentence for the arming enhancement. The People agree. The trial court's failure to either impose the enhancement or strike it is a legally unauthorized sentence. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) An unauthorized sentence may be corrected at any time. (*People v. Smith* (2001) 24 Cal.4th 849, 854.)

A court is required to pronounce judgment on all guilty counts and true enhancements. "Upon conviction it is the duty of the court to pass sentence on the defendant and impose the punishment prescribed. [Citations.] Pursuant to this duty the court must either sentence the defendant or grant probation in a lawful manner; it has no other discretion. [Citations.] Where sentence is imposed upon multiple convictions the

trial court, in order to avoid the double punishment forbidden by Penal Code section 654, may stay execution of the less severely punishable offense, pending an appeal or during service of any term fixed by the Adult Authority for the more severely punishable offense, the stay to become permanent at the completion of service of any sentence for the more severely punished offense.” (*People v. Cheffen* (1969) 2 Cal.App.3d 638, 641-642; see also *People v. Irvin* (1991) 230 Cal.App.3d 180, 190-191.)

In this case, both parties agree that the trial court erred in failing to pronounce a sentence for the arming enhancement. We agree and therefore, remand this case to the trial court.

On remand, however, instead of simply pronouncing a sentence for the arming enhancement, defendant argues that “the court must also determine whether sentence on the enhancement or sentence on count [2] must be stayed under section 654.” Although the People do not directly respond to this argument, they imply that based on the reporter’s transcript of the hearing, “[t]he court seemed to suggest that it would stay the execution of the term under Penal Code section 654, but it never specifically stated what term it would impose.”

During the sentencing hearing, the trial court repeatedly discussed its concerns with imposing a consecutive term for the arming enhancement because of section 654 issues. The court noted the arming enhancement could “be enhanced at three, four, or five” years. The court stated that it believed there would be a problem with imposing the term under section 654: “The Court is concerned about the possibility of a [section] 654 problem in this matter and also determining whether or not there is sufficient factual basis

to impose the aggravated term on both of those so the Court is inclined to impose the statutory term of 25 to life which is the recommendation of the probation officer.” When the prosecutor clarified whether the court believed the imposition of a term for the enhancement posed an issue under section 654, the court responded: “The problem I see is there’s certainly the potential for that. It’s an additional five year period. The reason being is that we have personally armed with a firearm and then we also have Count 2 is a . . . felon in possession of a firearm. And it seems to me that there is enough of a connection.” After the court imposed three consecutive life terms for counts 1, 2, and 3, the prosecutor asked if the court stayed the arming enhancement of five years. The court responded, “I didn’t impose it. I just imposed the 25 to life. I have a sentencing choice, and I exercised the 25 to life sentencing choice.”

The minute order from the sentencing hearing states: “As to Enhancement PA-12022(c)PC in Count 1, the Court imposes the LOW of 3 years [¶] Court Orders Time imposed on Enhancement(s) PA-12022(c)PC in count 1 stayed.” The abstract of judgment lists an “S” next to the arming enhancement.

In response, defendant claims that “the court’s statement at sentencing indicating it exercised its sentencing discretion not to impose punishment for the enhancement relates not to its Penal Code section 654 discretion but to its sentencing choice of the minimum parole eligibility term of the Three Strikes sentence for count [1].”

Although we believe that the trial court contemplated the effect of section 654 in its sentencing decision, we agree that the court failed to clearly indicate that it was exercising its sentencing discretion not to impose punishment for the enhancement under

section 654. Because we are already remanding this case to the trial court, we order that on remand, the trial court also exercise its discretion to determine which punishment—the arming enhancement attached to count 1 or for the possession of a firearm offense—must be stayed under section 654.

Accordingly, the matter is remanded to the trial court to correct the unauthorized sentence and for the trial court to exercise its discretion.

D. THE PRESENTENCE CONDUCT CREDITS SHOULD BE
 RECALCULATED

Defendant argues, and the People agree, that the trial court improperly limited presentence conduct credits under section 2933.5 because that statute did not apply to defendant.

The failure to award the legally mandated amount of presentence custody credits results in an unauthorized sentence that can be corrected whenever it is discovered. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) A sentence is unauthorized “where it could not lawfully be imposed under any circumstance in the particular case [such as] where the court violates mandatory provisions governing the length of confinement.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

In this case, the trial court limited defendant’s presentence conduct credits to 60 days because it believed section 2933.5 applied to him. Section 2933.5 requires that the defendant commit one of the several felony offenses listed in subdivision (a)(2) of that

statute.³ Defendant, however, did not commit any of the felonies listed under section 2933, subdivision (a)(2), as part of his commitment offense. Therefore, section 2933.5 did not apply to defendant. The trial court, therefore, imposed an unauthorized sentence. The matter is remanded to the trial court for recalculation of the appropriate number of conduct credits defendant is due.

DISPOSITION

The order denying defendant's petition to recall his sentence is affirmed with respect to defendant's conviction for possession for sale under Health and Safety Code section 11351.5. The order is reversed with respect to his convictions for receiving stolen property under Penal Code section 496, and being a felon in possession of a firearm under Penal Code section 12021, subdivision (a), because the jury did not find that he

³ Section 2933.5, subdivision (a)(2), states: "As used in this subdivision, 'felony offense' includes any of the following: [¶] (A) Murder, as defined in Sections 187 and 189. [¶] (B) Voluntary manslaughter, as defined in subdivision (a) of Section 192. [¶] (C) Mayhem as defined in Section 203. [¶] (D) Aggravated mayhem, as defined in Section 205. [¶] (E) Kidnapping, as defined in Section 207, 209, or 209.5. [¶] (F) Assault with vitriol, corrosive acid, or caustic chemical of any nature, as described in Section 244. [¶] (G) Rape, as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262. [¶] (H) Sodomy by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person, as described in subdivision (c) of Section 286. [¶] (I) Sodomy while voluntarily acting in concert, as described in subdivision (d) of Section 286. [¶] (J) Lewd or lascivious act on a child under the age of 14 years, as described in subdivision (b) of Section 288. [¶] (K) Oral copulation by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, as described in subdivision (c) of Section 288a. [¶] (L) Continuous sexual abuse of a child, as described in Section 288.5. [¶] (M) Sexual penetration, as described in subdivision (a) of Section 289. [¶] (N) Exploding a destructive device or explosive with intent to injure, as described in Section 18745, or resulting in great bodily injury or mayhem, as described in Section 18750. [¶] (O) Any felony in which the defendant personally inflicted great bodily injury, as provided in Section 12022.53 or 12022.7."

was armed during the commission of those offenses. The matter is remanded to the trial court with directions to find defendant eligible for resentencing under the Act as to the latter two convictions only, and to proceed as described in subdivision (f) of section 1170.126 of the Penal Code. The matter is also remanded to the trial court for resentencing so as to correct the unauthorized sentences and for the court to exercise its discretion under Penal Code section 654. In all other respects, the judgment is affirmed.

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MILLER

J.

We concur:

McKINSTER

Acting P. J.

KING

J.